

Rettke (Migration) [2019] AATA 856 (18 February 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Svenja Rettke
CASE NUMBER:	1733048
DIBP REFERENCE(S):	BCC2015/1876018 BCC2018/190166
MEMBER:	Justin Owen
DATE:	18 February 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 18 February 2019 at 2:03pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – relationship ceased – family violence claim – evidential requirements – ministerial instrument IMMI 12/116 – minimum of two items of evidence (and not more than one of each type of evidence) – statutory declaration by or on behalf of alleged victim – no valid claim to consider – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), r 1.22, 1.23, 1.24, 1.25; Schedule 2, cl 801.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 December 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 30 June 2015 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the applicant was not at the time of decision the spouse or the de facto partner of the sponsoring partner and she did not satisfy any of the alternative criteria such as the death of the sponsor, any incidence of family violence or the existence of a child of the relationship.
5. Relevantly to this matter the primary criteria include cl.801.221 which requires the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.801.221(6)(b), (c)(i)(A). The applicant claims this occurred in this case.
6. On 26 April 2018 the Tribunal wrote to the applicant pursuant to sections 359A and 359(2) of the Act inviting her to comment on or respond to information by 10 May 2018. The applicant responded through her representative on 4 May 2018 requesting an extension of at least two weeks to provide further information. The Tribunal agreed and granted an extension until 24 May 2018. The applicant through her representative responded in writing to the Tribunal on 17 May 2018.
7. The applicant appeared before the Tribunal in Perth, Western Australia on 7 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Jason Charles Clement and Mr Robert Arthur Marshall.
8. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

10. ISSUE

11. Relevantly in this case, at the time of decision, to be granted a Subclass 801 visa, the applicant must continue to be sponsored by her sponsoring partner (except where exceptions apply).

12. EVIDENCE

13. The applicant told the Tribunal that the relationship with her sponsor had ceased. She said she and the sponsor had finally broken up in January 2017.

14. The Tribunal sought to determine whether circumstances existed in which the applicant may continue to be considered for the grant of visa.
15. The applicant confirmed the sponsoring partner is not deceased.
16. The Tribunal asked whether there were any children from her relationship with her former sponsor. The applicant said that there was not. The applicant made no claims concerning the exception relating to children.
17. The Tribunal asked whether the applicant had any claim in regards to relevant family violence perpetrated against herself by the sponsor. In response to the Tribunal's question she said she wished to claim the family violence exception.

18. **FINDINGS**

19. Clause 801.221 subclause (1) of the Regulations requires that the applicant must, at the time of decision, satisfy subclause (2), (2A), (3), (4), (5) (6) or (8) of clause 801.221. Relevantly in this case, 801.221 subclause (2) requires that the applicant remains the spouse (as defined under section 5F of the Act), or de facto partner (as defined by section 5CB of the Act) of their sponsoring partner at that time.
20. As the sponsoring partner has withdrawn sponsorship as evidenced in the delegate's decision record provided by the applicant and by the applicant in her oral evidence to the Tribunal, the applicant in this case no longer continues to be sponsored for the grant of the visa by her sponsoring partner who in this case is an Australian permanent resident, who sponsored the applicant for that visa. Accordingly the applicant does not continue to satisfy the criteria in cl.801.221(2).
21. The applicant may satisfy clause 801.221 by meeting the requirements of at least one of the subclauses (3), (4) (5) and (6). These prescribe certain circumstances in which an applicant may continue to be considered for the grant of permanent residence where the relationship with the sponsor has ceased. These include the death of the sponsoring partner; family violence; and certain court orders or responsibilities in relation to children.
22. The Tribunal sought to determine whether circumstances existed in which the applicant may continue to be considered for the grant of visa. The Tribunal noted the written submissions provided by the applicant including a statutory declaration from her psychologist Mr Derek Amenkowicz dated 9 May 2018 (T1, Folio.60-62), correspondence from her psychotherapist Ms Zita Caruana dated 17 February 2018 as well as correspondence from three acquaintances of the applicant – Mr Jason Charles Clement, Mr Robert Arthur Marshall and Ms Loren McMath who each attested to the corrosive nature of the applicant's relationship with her former sponsor, the impact the sponsor's behaviour had upon the applicant's self-esteem and the general dysfunctionality of the relationship (T1, Folio.35-38).
23. A range of information and evidence was also provided pertaining to the genuine nature of the applicant's previous relationship with the sponsor including photographs, joint bank statements and a joint residential tenancy agreement. The Tribunal accepts that the applicant was previously in a genuine and continuing relationship with the sponsor and this was at the time of the alleged non-judicial family violence. That relationship, as it is agreed, has now ended.
24. At the hearing the Tribunal invited the applicant to make a claim and provide any information he believed may be relevant to these exceptions. The applicant stated that the sponsor was not deceased. The applicant therefore does not meet 801.221(5).

25. The applicant said there were no children in the relationship so there was no claim in relation to the exceptions involving the care of and responsibility for children. Accordingly, at the time of decision the applicant does not meet the alternative criteria in relation to children: cl.820.221(3)(b)(i).
26. At the hearing in response to the Tribunal's invitation the applicant said she wished to claim the family violence exception.
27. Division 1.5 of the Regulations contains the substantive provisions relating to family violence and sets out the evidentiary requirements for a claim of this nature. Under r.1.22 a reference to a person having suffered or committed family violence is a reference to a person being taken under r.1.23 to have suffered family violence. The applicant is required to provide the necessary evidence in order to establish a valid claim of family violence under Regulation 1.24(b) of the *Migration Act*.
28. At the hearing the Tribunal discussed the making of a formal claim of family violence. The Tribunal stated that for it to consider a formal claim of family violence then it must be presented and submitted in the required form. The Tribunal noted that the applicant in making a claim of non-judicial family violence was required to put forward written evidence in the form of various documentation that details the incidents, the perpetrator and the victim. The Tribunal discussed some of these forms of such evidence such as social worker's reports and medical reports. The Tribunal noted that the evidentiary requirements are outlined in the *Migration Regulations* under Regulation 1.24. The Tribunal pointed out the requirements were outlined in the instrument IMMI 12/116. The Tribunal noted that the applicant also had to provide a statutory declaration.
29. The Tribunal noted that the applicant had provided a report from a psychologist and a letter from a psychotherapist. The Tribunal asked if the applicant had any further documentary evidence she wished to submit to the Tribunal as part of her claim. The applicant responded that she did not have any further documents beyond what she had already submitted.
30. The applicant said she first saw her psychologist in November 2015 until May 2016 and had seen him up to twenty times until she ran out of Medicare support. The applicant said she had been depressed at the time and was referred to the psychologist by her GP. She said at that time it was put down to her partner the sponsor being away. She said that as she talked with the psychologist they started to focus more on the problems at home.
31. The applicant responded that the psychologist did not refer her on for further treatment or for a Mental Health Plan. The applicant said she was focusing on finances at the time. The Tribunal asked the applicant if she had received any further mental health treatment. The applicant said she had through her psychotherapist Ms Caruana who she visited every three weeks from November 2016 for around one and a half years. The applicant said she had stopped seeing her after she moved from Perth to the east coast.
32. The Tribunal asked the applicant what was the first incidence of family violence and what were the other incidents of family violence.
33. The applicant said she was not sure what the first incidence of family violence as what she interpreted then was different to what she interpreted now.
34. The Tribunal noted the applicant's written submissions (T1, Folio.64-69) through her representative concerning her former sponsor and her claims of his controlling actions towards her. The Tribunal asked for examples of this behaviour. The applicant said that the sponsor was not very warm towards her and withdrew. The applicant said that when she raised issues with the sponsor he withdrew from her. The applicant said that when she

could not find work in Geraldton she considered entering the field of property management. She said the sponsor was totally opposed to it and became further withdrawn from her. The applicant said that when she argued with the sponsor she would almost always have to cave in. The applicant said the sponsor withdrew from physical intimacy with her. She said he would criticise her.

35. The applicant said she began to realise the relationship was not good when she moved to Geraldton in October 2014. The applicant said by the time the sponsor withdrew sponsorship in January 2017 she and the sponsor were barely talking. The applicant said that she last saw the sponsor in March 2017.
36. The applicant said in June 2014 after she and the sponsor entered into a long-term relationship then she started looking after their finances collectively. The applicant said she tried to involve him in the management. She said that the sponsor started to become paranoid about the finances. The applicant said that the sponsor eventually opened a second account and connected their first account which he had control over.
37. [Information deleted].
38. The Tribunal asked the applicant if she saw anyone other than the psychologist and her psychotherapist during this period about her relationship with the sponsor. She said that she didn't and only discussed with friends and family.
39. Oral testimony was received at the Tribunal hearing from the applicant's friends, Mr Clement and Mr Marshall. Mr Clement talked about how he met the applicant in 2016 whilst hiking. He talked about the growth of the applicant and her journey back towards being a happy person after the relationship. Mr Clement talked about the coldness of the sponsor's behaviour towards the applicant and the fact she was not comfortable with the sponsor and the detrimental effect it had upon the applicant's self-esteem. He talked about the improvement in the applicant's sense of self in recent months.
40. Mr Marshall talked about his great relationship with the applicant. He said he first met the sponsor in 2014. Mr Marshall said he was not happy with the relationship from the start. He said that when the applicant moved to Geraldton he saw the relationship fall apart. He said he received numerous calls from the applicant who was very upset. He said that the sponsor wasn't communicating with the applicant or putting time into the relationship. Mr Marshall said the applicant advised him she was seeing a therapist when she moved back to Perth. He said that the applicant had to beg for the sponsor's attention. Mr Marshall said he advised the applicant to get out of the relationship. He said the sponsor wanted the applicant to get out of their shared residence in early 2017. He said the applicant moved out in February 2017 and the sponsor informed the Department of the end of the relationship in March 2017. [Information deleted]. He said the applicant was still suffering from the effects of the relationship. He said she had suffered emotionally and mentally from the sponsor's behaviour. He said that when he had seen the applicant and sponsor together there was no closeness between the parties.
41. The applicant's representative stated to the Tribunal that the evidence given by the three witnesses that there was emotional abuse, isolation, a lack of physical intimacy, control and financial abuse of the applicant which all were manifestations of domestic or family violence. The applicant's representative said the applicant's self-esteem had been damaged by the sponsor. [Information deleted].
42. The Tribunal has carefully considered the applicant's written submission to the Tribunal dated 17 May 2018 and the claims concerning the sponsor's alleged actions towards the applicant which included isolation, passive aggressive behaviour, a lack of physical intimacy,

emotional withholding, self-esteem damaging criticism, financial control, possessive behaviour, abuse and attempted financial blackmail.

43. The Tribunal has a great deal of sympathy for the applicant. The Tribunal notes the applicant has been in Australia since 2013 and on all accounts has made a positive contribution during this time. She has developed some genuine and endearing friendships and clearly with a new job in far North Queensland has a long-term desire to make her future in Australia. The Tribunal found the applicant to be entirely honest and open in her oral testimony about her former relationship and the challenges she faced with her former partner and sponsor. The Tribunal notes the oral testimony of her witnesses who have all attested to the fundamental decency and genuineness of the applicant.
44. The Tribunal unfortunately however cannot make a formal finding of family violence in relation to the applicant on the evidence before it.
45. The Tribunal has provided the applicant with the opportunity to provide appropriate evidence in order to make a valid claim of family violence. The Tribunal has provided a reasonable period of time to do so. The Tribunal wrote to the applicant nearly nine months ago inviting her to provide information that she believed may be relevant to the exceptions such as family violence. The Tribunal notes the applicant has representation as part of the review process and her representative both made extensive written submissions and attended the hearing.
46. The Tribunal notes the statutory declaration from her psychologist Mr Derek Amenkowicz concerning the family violence claim provided by the applicant dated 12 March 2018. The Tribunal accepts that this specific piece of evidence from Mr Amenkowicz is a type of evidence specified in the relevant instrument.
47. The applicant has also provided a one-page psychotherapist's letter from Ms Caruana dated 16 February 2018. The Tribunal acknowledges the treatment the applicant undertook with Ms Caruana but notes that a psychotherapist's letter or report is not a type of evidence specified by the Minister by instrument in writing for r.1.24(b) of the *Migration Regulations* 1994 and as specified in Schedule 1 of the instrument IMMI 12/116.
48. The Tribunal has had regard to the correspondence of Mr Clement, Mr Marshall and Ms McMath as well as the oral testimony of Messrs Clement and Marshall. The Tribunal again notes that this correspondence and evidence is not a type of evidence specified by the Minister by instrument in writing for r.1.24(b) of the *Migration Regulations* 1994 and as specified in Schedule 1 of the instrument IMMI 12/116.
49. Regulation 1.24(b) of the *Migration Regulations* 1994 and as specified in Schedule 1 of the instrument IMMI 12/116 requires a minimum of two items of evidence (and not more than one of each type of evidence) are required to make a formal claim of family violence. Whilst the psychologist's report of Mr Amenkowicz meets this criterion, all other evidence submitted by the applicant unfortunately fails to do so. No further type of evidence specified by the Minister by instrument has been submitted in evidence by the applicant. The Tribunal asked the applicant at the hearing if she had any further evidence she wished to submit as part of her claim. The applicant responded that she did not have any further documents beyond what she had already submitted. The applicant fails to meet r.1.24(b) of the *Migration Regulations* 1994.
50. The Tribunal furthermore notes that the applicant has not provided further evidence in the nature and form required to make a valid claim of judicially determined, or non-judicially determined family violence. The applicant has also not made a valid statutory declaration under Regulation 1.25. Regulation 1.25 sets out the requirements for a statutory declaration submitted by the spouse, de facto partner or interdependent partner (as relevant) of the

alleged perpetrator of family violence. There is no statutory declaration from the applicant before the Tribunal. No statutory declaration has been made on her behalf. She therefore has failed to provide the necessary evidence for the making of a formal claim of family violence. Regulation 1.24 of the *Migration Regulations* provides that the evidence mentioned in paragraph 1.23(9)(c) is (a) a statutory declaration under regulation 1.25 which deals with statutory declarations by or on behalf of alleged victims; and (b) each type of evidence specified by the Minister, by instrument in writing for this paragraph. As the applicant has not provided this evidence of a statutory declaration by or on behalf of the applicant, the applicant's claim of family violence is not a valid and formal claim.

51. The Tribunal finds that the applicant has not made a formal claim it can consider of family violence. The applicant has not provided further evidence in the nature and form required to make a valid claim of judicially determined, or non-judicially determined family violence. The applicant has not provided a statutory declaration under r.1.25. The applicant has furthermore failed to provide the evidence specified by the Minister by instrument in writing for r.1.24(b) of the *Migration Regulations* 1994 and as specified in Schedule 1 of the instrument IMMI 12/116 which requires a minimum of two items of evidence (and not more than one of each type of evidence). The only written evidence she has supplied which meets the requirements of the instrument is the psychologist's report. The applicant's claim of family violence is not a valid claim. Accordingly, the Tribunal has no valid claim to consider.
52. Given the evidence above the applicant does not meet the alternative criteria in cl.801.221 (3)-(6).
53. There is no evidence or suggestion before the Tribunal that the applicant meets the alternative criteria cl.801.221 (2A) and (8) which rely on specific procedural scenarios that do not apply in this case.
54. Accordingly, given all the above, at the time of decision the applicant does not meet cl.801.221 and does not satisfy the criteria for the grant of the visa.
55. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

56. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justin Owen
Senior Member